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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 796

CRANE BOOM LIFE GUARD CO., INC., MEL EPPERSON, FREDA EPPERSON, C. E. HAILE, PAULINE HAILE, OSRO COBB, C. H. SANSOM and S. A. COFFEY,
Petitioners,

vs.

SAF-T-BOOM CORPORATION, C. H. EARL and ARTHUR J. THOMAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eight Circuit, reported at 362 F. 2d 317, 150 USPQ 334, is appended hereto as Appendix A. The Decree thereupon appears as Appendix B. The Consent Decree entered May 31, 1962 (R. 1, 2), appears as Appendix C.

Memorandum Opinion of District Court, not reported (R. 169) is Appendix D; Supplemental Decree of the District Court is Appendix E.

JURISDICTION.

The opinion of the United States Court of Appeals for the Eighth Circuit was delivered and filed on June 30, 1966. The time to file Petition for Writ of Certiorari was extended by Order entered September 23, 1966, to and including November 25, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED.

Whether a Consent Decree, bottomed upon a patent manifestly invalid and obtained by fraud upon the Patent Office, which Decree did not adjudicate either infringement or validity of the Patent may be enforced in a contempt proceeding against parties foreign to the original proceeding.

Whether a patent, No. 2,950,016, manifestly invalid for violating the Patent Statutes and obtained by fraud upon the Patent Office may be enforced under any guise.

Whether a patent, No. 3,100,575, first raised in an ancillary proceeding and against which no prior art or notice of prior evidence to be relied upon has been cited may be invalidated by the Trial Court.

Whether copying the functional features, only, of a competitive device comprises unfair competition.

STATUTES INVOLVED.

The pertinent statutes involved comprise Title 35, U. S. C., Section 102 (b) and Section 282. These sections as here pertinent are as follows:

35 U. S. C., § 102:

§ 102, Conditions for Patentability, novelty and loss of right to patent.

"A person shall be entitled to a patent unless
* * *

(b) the invention was patented or described in a printed publication in this or a foreign country more than one pear prior to the date the application for a patent in the United States * * *."

35 U. S. C., § 282:

§ 282, Presumption of validity: Defenses.

A patent shall be presumed to be valid. The burden of establishing validity shall rest on the party asserting it.

The following shall be defenses in any action involving * * * infringement of a patent and shall be pleaded.

* * * * * * * *

(2) Invalidity of the patent or any claim in suit on any grounds specified in II of this title as a condition for patentability.

STATEMENT OF THE CASE.

An invalid patent "should not remain in the art as a scarecrow" (Learned Hand, J., in Bresnick v. U. S. Vitamin, 139 F. 2d 239, 242 (C. A. 2, 1943)).

This case comes here for review of the decree of the U. S. Court of Appeals for the Eighth Circuit in Action No. 18,209, Crane Boom Life Guard Co., Inc., et al. v. Saf-T-Boom Corporation et al., a copy of which it attached hereto as Appendix B.

This decree was entered pursuant to the opinion of the Court of Appeals for the Eighth Circuit which is annexed

as Appendix A. The supplemental decree of the District Court to which the Court of Appeals decree refers is reproduced at R. 176 and the Memorandum opinion of District Court upon which the supplemental decree is based is reproduced at R. 169.

In April, 1952, Arthur J. Thomas and Gordon I. Zane filed application for patent for a protective device for the booms of cranes and the like identical with the device defined in Claims 1, 4, 6 and 7 of the patent 2,950,016[1] and as exemplified by Ex. 110, R. 55, 196; that application did not mature into any patent nor into patent 2,950,016 here in issue. A manufacturing contract was entered (Ex. 113, R. 201) for the manufacture and offer for sale of the device. The contractors distributed a brochure (Ex. 114, R. 202) having pictures and drawings thereon indicating the Crane Boom Guard of Thomas and Zane and its application to the crane boom, during 1952-3-4 (R. 96). Royalties were paid to Thomas and Zane during 1952-3-4-5 upon the sales of the device (R. 99). These devices embraced and included each and every element of construction, application and functional use as set forth in Claims 1, 4, 6 and 7 of Thomas patent 2,950,016.

Included among such sales are the Phelps Dodge transaction in 1953 [Bryant deposition and Exhibits (R. 88-91), Sparkman deposition (R. 92-94)]. The device was advertised in the exhibits of record, Excavating Engineer Magazine, pages 42, 43 and 44 (Ex. 111, R. 197), Western Construction Magazine, July, 1952, page 73 (Ex. 112, R. 20).

In 1957, five years after the initiation of the publicity, Thomas acquainted respondent Earl with the device and his success in the sale thereof in the earlier venture and

1 The present inquiry was specifically limited to the validity of Thomas patent 2,950,016 Claims 1, 4, 6 and 7 (R. 41).

furnished Earl with copies of the articles from the magazines (Ex. 111, 112; R. 49, 138, 197-200). Respondent Earl supervised the preparation of an application for patent which was executed by Thomas in 1958. In this application no disclosure was made of the prior public use and sales or of the prior publications (R. 76, 138, 139, 143). Upon this 1958 application, Thomas patent here in question, 2,950,016, was ultimately issued by the Patent Office. No disclosure of the prior public use was made either in the original application papers and oath as signed by the purported inventor Thomas or during the prosecution of the case, despite the knowledge of the persons supervising the same. Respondent Thomas assigned the application which matured into Patent 2,950,016 to Saf-T-Boom Corporation, Inc.

Crane Boom Guard Co., Inc.,[2] began the manufacture of Boom Guards of the Thomas type and infringement action was filed by Saf-T-Boom, naming Crane Boom Guard Co., Inc., H. P. Merritt, Jr., S. A. Coffey and Arthur J. Thomas as defendants.[3]

During the course of the trial of the action filed by Saf-T-Boom and before reception of evidence as to invalidity of the Thomas patent, the trial was concluded with a Consent Decree (R. 1). The pertinent portion of the Consent Decree reads as follows:

> "It is therefore considered, ordered, adjudged and decreed by the court in accordance with the agreement and consent of parties announced to the court that the defendants and each of them be and they

2 This corporation is not to be confused with the petitioner herein Crane Boom Life Guard Co., Inc.

3 Of these named parties, Crane Boom Guard Co., Inc. is not now existent. Merritt has no interest with the matter and is not a party herein. Arthur J. Thomas, an original defendant aligned with Crane Boom Guard Co., Inc., is a defendant and respondent in the present petition. Coffey is the only one of the original parties who is a petitioner herein.

hereby are permanently enjoined from infringing U. S. Patents Nos. 2,950,016 and 2,988,195.''[4]

No mention or finding as to validity of the Thomas patent appears in the Consent Decree. No mention or finding as to infringement of the Thomas patent appears in the Consent Decree. The nature of the agreement has been found by the district court in a subsequent proceeding.[5] The finding as to the agreement of the parties appears (R. 7), the court stating ''there is no dispute as to the terms of the agreement.'' As is apparent from the agreement so found and defined by the District Court there is no stipulation or agreement as to the validity of the Thomas patent[6] and the Consent Decree recording the agreement of the parties makes no finding as to infringement of the Thomas patent.[7] It also appears (R. 12) that the parties refused to sign a proffered agreement which referred to infringment as they ''were unwilling to sign anything that they thought might be construed as an admission of past infringement'' (R. 12).

Petitioner Coffey filed an application for an improved Crane Boom Life Guard which was pending at the time of the hearing of the motion under Rule 60 (R. 8) and which matured in the Coffey patent 3,100,575 issued August 13, 1963. He was advised by his engineer consultant that his device did not appear to infringe the Thomas patent (R. 158, 159).[8] A new corporation entitled Crane Boom Life Guard Co., Inc. (hereinafter Life Guard),

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4 Patent 2,989,141 is not now involved, the inquiry having been limited to Patent 2,950,016 (R. 41).

5 Motion under Rule 60 (b) filed November 13, 1962.

6 The District Court recognized the absence of finding of validity (R. 174): "It is true that the Consent Decree in this case does not in terms say that the Thomas patents are valid.

7 The District Court pointed out (R. 13): "It will be noted in this case that the decree contains no finding or recitation of past infringement."

8 This advice was apparently confirmed by Saf-T-Boom expert witness Meirkreebs (R. 122, 123).

received an assignment of the Coffey patent and began manufacture of Boom Guards in accordance with the details of the Coffey patent.

An affidavit for order to show cause (R. 14) was presented to the District Court by Saf-T-Boom; subsequently, an order to show cause was filed herein naming as parties the present petitioners.[9] Petitioners herein filed a third party complaint for a declaratory judgment of the invalidity of Thomas patent 2,950,016 (R. 20-29).

This cause came on for hearing upon the third party complaint and upon the stipulation restricting the question to the matter of validity of Thomas patent 2,950,016, claims 1, 4, 6 and 7, in the course of which the complete disclosure of the prior public use, sales and prior publication of the device defined in claims 1, 4, 6 and 7 of Thomas 2,950,016 were shown. The testimony to this effect begins at R. 61 and is particularly characterized by Ex. 111, R. 197, Ex. 112, R. 200, Ex. 114, R. 202.[10]

This hearing fully developed prior public use of the device of Thomas patent 2,950,016, many years prior to the filing of the application (1958) which matured into this patent, that there was no disclosure of this prior use to the Patent Office at the time of the filing of the application by respondent Thomas which matured into the patent in question; that there was no disclosure by him or by respondent Earl to the Patent Office of the details of the prior publications during the prosecution of the application and prior to its maturity into Patent 2,950,016; and there was no evidence introduced respecting the invalidity of Coffey patent 3,100,575.[11]

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9 No process has been issued upon the Consent Decree in this action for serving a writ of injunction upon any of the petitioners herein.

10 Ex. 114 is erroneously shown in the index of the record at Page 114 whereas it actually appears at Page 202.

11 It will also be noted that there was no notice of the introduction of any evidence relating to the validity of the Coffey patent prior to the above mentioned hearing.

After the conclusion of the hearing, the District Court entered decree maintaining the prior proceedings and (1) ignoring the evidence introduced at the hearing of the invalidity of Thomas patent 2,950,016 on account of the prior public use, sales and publications; (2) ignoring the evidence of the fraud practiced upon the Patent Office in the obtaining of the Thomas patent; (3) gratuitously and without any apparent evidence holding Coffey patent 3,100,575 invalid. The apparent basis of the Court's conclusion and the concurrence of the Court of Appeals was that the parties (here the petitioners) were barred on account of the Consent Decree from raising an attack against the Thomas patent.

The District Court and the Court of Appeals have thus placed their imprimatur upon a worthless patent contrary to public policy and to the public interest in the validity of patents and have thus defined a compromise of the patent system and these decisions are directly in conflict with the opinion of the U. S. Court of Appeals for the Second Circuit in **Addressograph-Multigraph Corp. v. Cooper** (C. A. 2), 159 F. 2d 483, and the opinion of the U. S. Supreme Court in **United States v. International Building Co.**, 345 U. S. 502.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The failure of an applicant for patent at the time of his application to disclose to the Patent Office his own prior public uses of the identical device and prior publications illustrating, showing and describing the identical device and the failure of the assignee of such an application having knowledge of such prior uses and prior publications to disclose the same to the Patent Office during the prosecution of the application, practices a fraud upon the Patent Office and the patent issued upon such an ap-

plication results from fraud upon the Patent Office so as to render that patent unenforceable.

A consent decree entered in an action based upon such a patent which consent decree does not adjudicate the validity of the patent and which consent decree does not adjudicate infringement of the patent, particularly where the parties to the consent decree specifically refused to agree to any admission of past infringement should not be enforced in a contempt proceeding particularly against persons who were not parties to the consent decree and who did not participate in the agreement of the parties which led to the consent decree.

In the present case respondent Thomas jointly with Gordon L. Zane (not a party to this action) on April 15, 1952, filed application for patent upon the boom guard of the present inquiry (Ex. 110, R. 55, 57, 196). This device is identical with the device defined in Claims 1, 4, 6 and 7 of Patent 2,950,016 in issue (R. 41). The device was sold, advertised for sale and put into public use (R. 57, Ex. 113, R. 201, R. 95, 96). An advertising brochure (Ex. 114, R. 202) was issued for advertising the offer for sale of the Crane Boom Guard. During the years 1952, 1953 and 1954 (R. 96) the advertisement was widespread publicly distributed and royalties were paid to respondent Thomas and Zane upon the sales of the device (R. 99). As to the sales of the device and their identity with the device of the present patent, see Bryant deposition R. 81-91, Sparkman deposition R. 92-94 and R. 98-99. A complete description and publication of the device was made in February, 1953, **Excavating Engineer Magazine**, Pages 42, 43 and 44 (Ex. 111, R. 197) and **Western Construction Magazine**, July, 1952, Page 73 (Ex. 112, R. 200).

In 1957, long after abandonment of the Thomas and Zane joint application, respondent Thomas furnished respondent Earl with copies of the magazine articles, Exhibits 111, 112, and thereafter, under the supervision of

Respondent Earl, Respondent Thomas executed and swore to a sole application for patent stating there was no prior use or sale and no prior publications of the claimed invention. This application was filed in the Patent Office January 24, 1958, and ultimately matured into Patent No. 2,950,016, with which we are concerned. This filing date was not only more than one year but was more than several years after the prior public use and sales and the prior publications of the device involved therein. Respondent Earl representing the assignee Respondent Saf-T-Boom was advised of the prior public use and sales and the prior publications but at no time during the prosecution of the application or in the preparation thereof was there any disclosure made to the Patent Office of the existence of this prior public use.

The patent is thus manifestly invalid on account of the prior public use and sales and prior publications substantially more than one year prior to the date and the filing of the application which matured into the patent and in addition its enforceability is barred because of

> "the far reaching social and economic consequences of a patent therefor give the public a paramount interest in seeking that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope" (**Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.**, 382 U. S. 172, 15 L. Ed. 2d 247, 251).

As otherwise stated in Rota-Carb v. Frye Mfg. Co., 313 F. 2d 443, 136 USPQ 507 (C. A. 8):

> "It must be remembered that the public is a silent but an important and interested party in all patent litigation and is **entitled to protection against the monopolization of what is not lawfully patentable**" (Emphasis supplied).

There is no showing that the Consent Decree in this cause was upon the merits. Instead the record shows and supports the fact that the Consent Decree was based upon collateral consideration for the purpose of freeing the parties from litigation. Thus the situation is somewhat like that which reached the U. S. Supreme Court in **United States v. International Building Co.**, 345 U. S. 502, 97 L. Ed. 1182, where the Court stated (345 U. S. 505, 506):

> **"As the case reaches us we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration * * * unless we can say that they were an adjudication of the merits the doctrine of estoppel by judgment would serve an unjust cause. It would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. * * *** A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity so far as collateral estoppel is concerned, than any judgment entered only as a compromise by the parties" (Emphasis supplied).

See also **Lawrence Mfg. Co. v. Jamesville Cotton Mills**, 138 U. S. 552:

> "that a court of equity has a right to decline to treat a Consent Decree as res judicata as such a decree is the **consequence of the consent** and not of the judgment of the court" (Emphasis supplied).

And see **All v. All**, 250 F. 120, which states that a Consent Decree is:

> "practically nothing more than a contractual matter between the parties."

In 97 L. Ed. 1188 beginning at 1191, a text annotation on the subject appears. There it is stated:

"(1) A judgment entered by agreement or consent should not be given a conclusive effect where to do so would violate an important public policy.

"(2) The extent to which a judgment or decree entered by consent is conclusive in a subsequent action **should be governed by the intention of the party that is expressed in the agreement which is the basis of the judgment** and gathered from circumstances rather than by a mechanical application of the general rules governing the scope of estoppel by judgment. It is obvious that a party may consent to a judgment for the purpose of securing freedom from litigation and may nevertheless not be willing to bind himself for other, perhaps more important, issues which may arise subsequently. And in particular, it seems that, in the absence of an unambiguous agreement of the parties to the contrary, a judgment by consent does not operate as a collateral estoppel as to questions of fact or law involved in the litigation so as to preclude the parties from litigating the same questions * * * (Emphasis supplied).

"(3) Generally speaking a judgment or decree entered by agreement or consent should be conclusive only upon the parties or privies of parties to the agreement and judgment. It should not be binding upon other persons even though such other persons would be bound by the judgment or decree had it been entered after contest."

The same text annotation, 97 L. Ed. at page 1194, continues and states:

"On the other hand a consent judgment or decree has not been given the effect of res adjudicata where

> giving it such an effect would establish as valid a patent which but for the res adjudicata effect of the consent decree would be invalid." (Emphasis supplied.)

In this situation there is no unambiguous agreement of the parties expressing in any manner their intent to agree either to the validity of Thomas Patent 2,950,016 or to the question of prior infringement thereof. This Thomas Patent is plainly and manifestly invalid on account of the prior public use, prior offers for sale, prior sales of the device and the prior publications illustrating and describing the device several years prior to the date of filing the application that matured into this patent. The Thomas Patent plainly should be invalid.

The Consent Decree here does not purport to adjudicate either infringement of the patent or validity of the patent and is relied on as a bar to an attack upon the validity of the patent to the detriment not only of the present Petitioners, particularly those who are not parties to the prior Consent Decree or to any agreement that led up to that Consent Decree or to the litigation in which the Consent Decree was entered, but also to the remainder of the public.

The decision of the Eighth Circuit Court of Appeals in the present case appears in effect to be in direct conflict with the decision of the Court of Appeals for the Second Circuit in **Addressograph-Multigraph Corp. v. Cooper**, 156 F. 2d 483. There the court stated, 156 F. 2d at 484:

> "At the trial of the present suit in the court below the Plaintiff-Appellant contended that the Consent Decree in the former suit estopped all the defendants from contesting the validity of the patent. * * * the court below concluded that the Consent Decree in the prior suit was invalid as a matter of law for the reason that infringement was not adjudicated therein,[12]

[12] Compare the present Consent Decree (R. 1) and (R. 13).

and hence that it did not estop any of the defendants from later contesting the validity of the patent. It found that there was no trial in the former suit nor any adjudication therein on the merits as to the validity of the patent,[13] that the Consent Decree although it did not give the defendant any relief provided for the payment of costs to them * * * 'on the contrary it found' the evidence discloses that the defendants rejected a proposed Consent Decree submitted by the Plaintiff to them because it contained an allegation that they infringed the patent.[14] The Consent Decree, therefore, submitted by the Plaintiff to Defendants and signed by them does not contain any allegation of infringement. And it found 'if Defendants in the prior suit did not infringe at the time that said Decree was entered, they were not seriously interested in any adjudication of validity of the Patent.' On these findings the Court below concluded that a Consent Decree in the prior suit adjudicating the patent to be valid cannot be sustained. In other words, the Court below held as a general proposition of law that an adjudication of the validity of a patent unless accompanied by an adjudication of infringement is invalid and will not estop a defendant from later contesting the validity of the same patent in another suit for infringement brought by the same plaintiff.

"We agree with the District Court that the issue of infringement was not adjudicated one way or another by the decree of the former suit and although no case directly in point has come to our attention we also agree with the District Court that on grounds of public policy such a decree should not estop." * * *

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13 See Consent Decree (R. 1); District Court Memorandum (R. 174).

14 See District Court Memorandum (R. 12): "They refused to sign the first proffered agreement * * * it referred to infringement * * * and for reasons appearing from the evidence * * * were unwilling to sign anything which they thought might be construed as an admission of past infringement."

(485):

"* * * But even though we can only say that the Consent Decree left the issue of infringement without adjudication, nevertheless we think on grounds of public policy we ought to rule and that in a decree, at least in one entered by consent, either an adjudication of infringement or a grant of some relief from which infringement may be inferred is essential before any effect of res adjudicata can be given to it on the issue of validity. In other words, we think the **public interest in the judicial determination of the invalidity of a worthless patent is great enough to warrant the conclusion that a defendant is not estopped by a decree of validity at least when the decree was by consent,** unless it is clear that in the litigation resulting in the decree the issue of validity was genuine." (Emphasis supplied.)

In the text annotation, 97 L. Ed. at 1195, 1196, it is stated:

"A judgment or decree entered by consent is not pronounced by the court in the exercise of its judicial function but is merely an administrative act recording the agreement of the parties and that no disputed acts are judicially determined thereby."

In **1B Moore's Federal Practice, page 4022,** it is said:

"Collateral estoppel in its usual connotation should not result in the consent judgment because a requisite litigation and judicial determination of issues are not normally present, but on the other hand we believe that preclusion ought to result from a judgment on an agreement **to the extent that the parties agree to be precluded.**" (Emphasis supplied.)

This action, based upon the Consent Decree (R. 1, 2), is essentially an action involving infringement of a Patent. According to **35 U. S. C. 282,** it is stated:

"The following shall be defenses in any action involving * * * infringement of a patent, and shall be pleaded:

"(1) * * *

"(2) Invalidity of the patent or any claim in suit on any grounds specified in II of this Title as a condition for patentability."

The parties have in no manner precluded themselves with respect to the validity of the patent. The Consent Decree makes no mention of it; the parties who are here petitioners were not parties to the original Consent Decree with the exception of the Petitioner Coffey, and the mandatory statutory defense plainly appears applicable.

It is axiomatic that an invalid patent cannot be infringed. For example, see **Johnson Farebox Co. v. National Rejectors**, 269 F. 2d 348, 122 USPQ 550 (CA 8). The Record plainly shows the invalidity of Thomas 2,950,016 on account of the prior public use, offers for sale and sales, as well as printed publications, of the device defined in the claims of that patent.

In addition, the Applicant for that patent was a participant in, and well knew, the prior public use and the prior publications as well as the prior sales (he received royalties therefrom) yet swore to the Patent Office that there were none such prior to the time of the application which matured into the patent here in question. This is a fraud on the Patent Office and should render the patent completely unenforceable in the public interest and as a matter of public policy, and, in view of all the circumstances present, Petitioners should not be estopped by the Consent Decree here involved.

As said in **Addressograph-Multigraph Corp. v. Cooper**, C. A. 2, 156 F. 2d 483, 485:

"the public interest in a judicial determination of the invalidity of a worthless patent is great enough

to warrant the conclusion that a defendant is not estopped by a decree of validity, at least when the decree was by consent, * * *."

This is entirely consistent with the principle enunciated by the Supreme Court in **Mercoid Corp. v. Mid Continent Investment Co.**, 320 U. S. 661:

"The patent is a privilege, but it is a privilege which is conditioned by a public purpose."

For these reasons it is believed that the present Petition should be granted and a Writ of Certiorari allowed.

II.

A patent should not be gratuitously declared invalid by a district Court where no denial of validity was presented by the opponent thereof in pleadings, no evidence or notice otherwise of any other prior art or patents or prior public uses of the device of the patent were pleaded or proved, and where there was no stipulation of the parties regarding the invalidity of that patent.

Coffey Patent 3,100,575 was held invalid in Supplemental Decree of the District Court as well as Memorandum Opinion of the District Court (R. 174, R. 177). This patent was issued upon an application filed by Petitioner Coffey, after the entry of the Consent Decree, and issued August 13, 1963 (Ex. 106, R. 193). This patent was declared upon (R. 127) against the Respondents herein in the Third Party Complaint filed May 4, 1964. This Complaint was responded to by Answer filed May 14, 1964 (R. 34 et seq.).

Nowhere in this Answer is there any allegation attacking the validity of the Coffey Patent. Nowhere in the Record or the Pleadings is there any notice of evidence of prior uses, sales, publications or prior art noticed to be relied upon as affecting the validity of the Coffey Patent.

No evidence was introduced on the hearing which related to the validity of the Coffey Patent.

35 U. S. C., § 282, provides in part as follows:

> "§ 282 Presumption of Validity; Defenses.
>
> "A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it.
>
> * * * * * * *
>
> "In action involving the validity or infringement of a patent the party asserting invalidity or non-infringement shall give notice in the pleading or otherwise in writing to the adverse party at least 30 days before the trial of the Country, number, date and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit, or * * *, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of, or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of said matters may not be made at the trial except on such terms as the court requires."

Although none of these prerequisites were satisfied and no evidence applied to the Coffey Patent 3,100,175 introduced in the trial, the Court stated (R. 174; Appendix D):

> "As stated, the Court finds that the Coffey device infringes the Thomas Patents. It follows from that finding that the Coffey Patent is itself invalid. That invalidity follows as a matter of course if the validity of the Thomas Patents is assumed."

Coffey Patent (Ex. 106, R. 193) comprises but a single relatively detailed claim (R. 195) which includes many

structural features that enter into its operational status which do not appear either in the Saf-T-Boom devices or in the Thomas Patent, or in any of the Publications that are here involved. These details included in the combination of that claim show: the heavy steel tubes with upturned hooks; the details of the positioning of the upturned hooks; the diagonally disposed bracing; the shape of the front intermediate member; the positioning of the porcelain insulators; the Micarta sheave and its mounting; and finally, and perhaps more importantly, the rubber shock absorbing mount on the porcelain insulators. None of these elements appear to relate to any of the elements shown in Thomas 2,950,016 nor in the prior publications which invalidate the Thomas Patent.

It is believed, therefore, on the Record, that the holding of the District Court, affirmed by the Court of Appeals, that the Coffey Patent is invalid, was gratuitously but erroneously inserted in the Decree and Opinion, and for this reason it is believed that the Petition should be granted and the Writ of Certiorari be allowed.

III.

Copying of the functional features of a competing device does not comprise unfair competition.

Apparently the only basis of the District Court holding unfair competition between Saf-T-Boom and Crane Boom Life Guard resides in the similarity and appearance of the physical functional features of the two devices, and in the similarity of advertising material showing these functional features. This may be competition, but it is not believed to be unfair competition. This Court, in **Sears Roebuck & Company v. Stiffel Company**, 376 U. S. 225, where the device in question had been copied in its exact commercial identity by the defendant, held:

"What Sears did was to copy Stiffel's design and to sell lamps almost identical to those sold by Stiffel. This it had every right to do under the Federal Patent Laws, that Stiffel originated the pole lamp and made it popular is immaterial."

An apt statement appears in **West Point Manufacturing Company v. Detroit Stamping Co.**, 222 F. 2d 581:

"The identical imitation of the goods of another does not in itself constitute unfair competition. 'The privilege to engage in business and to compete with others implies a privilege to copy or imitate the physical appearance of another's goods. The public interest in competition ordinarily outweighs the interest in securing to a person the rewards of his ingenuity in making his product attractive to purchasers, but the privilege to imitate may be limited by legislative enactment. Thus in order to encourage invention or art a patent or copyright may for a limited period of time protect one's interest in the physical appearance of his goods.'"

The crux of the matter is that if a competitor desires to copy a manufacturer's device he runs the risk of infringing the manufacturer's patent. This is legislative enforcement. Even if he copies it identically and even if it is an infringement of an existing valid patent this still is not unfair competition under the common law of unfair competition.

It is asserted that the imitation of a product insofar as the common law principles of unfair competition are concerned is not unfair competition where it is limited to the physical functional features of the manufacturer's device. Such is here the situation. The Record has been carefully examined and we can find no evidence in the Record as to copying by the Petitioners herein of any non-functional distinctive feature of the Respondents' device which

might have come to be recognized as an indicia of the source of origin of that product. We repeat that this does not spell unfair competition. Whether or not it spells patent infringement under a legislative enactment is a completely separate question.

For the foregoing reason it is submitted that the Petition should be granted and the Writ of Certiorari allowed.

CONCLUSION.

For the foregoing reasons it is submitted that the Petition should be granted and the Writ of Certiorari allowed in this Action.

In the first instance, there is a Patent which is manifestly invalid on account of the proven prior public uses, prior public sales, prior publications, long prior to the filing of the application for patent. Although known to the applicant for the patent here in question, no disclosure was made to the Patent Office either by him or by his assignee of these facts. The manifestly invalid patent was obtained by the practice of a fraud on the Patent Office. The existence of this Patent upon the patent records is contrary to public policy and contrary to the public interest.

The Consent Decree upon which reliance is made by Respondents does not represent any finding or agreement as to infringement of Thomas patent 2,950,016, and does not include any agreement or finding as to the validity of that patent. The Parties Petitioner herein were not parties to the original Decree or to the agreement which led to the original Consent Decree. It is urged that no estoppel should be effective against the present Parties Petitioner on the basis of the aforesaid Consent Decree or in the present proceedings.

No valid evidence was pleaded or proved and no facts alleged contrary to the validity of Coffey Patent 3,100,175.

The gratuitous holding of invalidity of that Patent should be set aside.

The device of Petitioners herein incorporates no non-functional feature of the device of Respondents. The adoption of a device which incorporates only the functional features of a competing device is not unfair competition. The holding of the District Court in this respect should be set aside.

It is respectfully urged that this Petition for Writ of Certiorari should be granted and the Writ allowed in order that this Court may properly make declaration for the correction of the manifest errors involved.

Respectfully submitted,

OSRO COBB,
Tower Building,
Little Rock, Arkansas,
Counsel for Petitioners.

J. HEISKELL WEATHERFORD, JR.,
1438 Commerce Title Building,
Memphis, Tennessee,
Associate Counsel for Petitioners.

The gratuitous holding of invalidity of that Patent should be set aside.

The device of Petitioners herein incorporates no non-functional feature of the device of Respondent. The imitation of a device which incorporates only the functional features of a competing device is not unfair competition. The holding of the District Court in this respect should be set aside.

It is respectfully urged that this Petition for Writ of Certiorari should be granted and the Writ allowed in order that this Court may properly make declaration for the correction of the manifest errors involved.

Respectfully submitted,

OSRO COBB,
Tower Building,
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Memphis, Tennessee,
Associate Counsel for Petitioners.

APPENDIX.

APPENDIX A.

United States Court of Appeals
for the Eighth Circuit.

No. 18,209.

Crane Boom Life Guard Co., Inc., et al.,
Appellants,
v.
Saf-T-Boom Corporation, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

[June 30, 1966.]

Before Vogel, Chief Judge, Matthes and Mehaffy, Circuit Judges.

Matthes, Circuit Judge.

This contempt proceeding grows out of a consent decree entered on May 31, 1962 in the United States District Court, Eastern District of Arkansas.

Following the issuance of a show cause order by Judge J. Smith Henley, the framing of the issues, and a plenary hearing, the District Court entered a decree on July 15, 1965 from which the appellants have perfected this appeal.

The history of this action is important. Saf-T-Boom, the assignee and owner of the so-called Thomas Patents Nos. 2,950,016 and 2,989,194, commenced an action on April 6, 1962 to enjoin infringement of the patents. The defendants were Crane Boom Guard Co., Inc. and its principal

stockholders, H. P. Merritt, Jr., S. A. Coffey and Arthur J. Thomas.[1]

After a partial trial of the infringement action on May 31, 1962, plaintiff and defendants, through their respective lawyers, compromised their differences, and agreed that a consent decree should be entered. The decree, prepared and approved by lawyers on both sides, was entered by the court on May 31 and provides:

> "On this day, the trial of this cause having been partially finished, the plaintiff and defendants by and through their respective attorneys, E. M. Arnold and Shelby R. Blackmon, announced to the Court that the parties have agreed upon a consent decree in this cause.
>
> "It is Therefore Considered, Ordered, Adjudged and Decreed by the Court in accordance with the agreement and consent of the parties announced to the Court, that the defendants, and each of them be and they hereby are permanently enjoined from infringing United States Patents Nos. 2,950,016 and 2,989,194.
>
> "It is Further Ordered, Adjudged and Decreed that no damages be awarded to either the plaintiff or the defendants.
>
> "It is Further Ordered, Adjudged and Decreed that the costs of this action be and they are hereby assessed against the plaintiff."

On November 13, 1962, Crane Boom Guard Co., Inc., H. P. Merritt, Jr., and S. A. Coffey filed a motion for relief under Rule 60 (b) of F. R. Civ. P. After a full hearing, Judge Henley denied the motion. No appeal was taken from that order. Judge Henley also filed a supporting memorandum opinion which contains findings of

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1 The Thomas Patents were developed by Arthur J. Thomas. They describe an insulating device for installation on the metal booms of machinery such as cranes and drilling apparatus, for the purpose of protecting the operators of the machinery from death or injury, resulting from the booms coming in contact with uninsulated high tension power lines.

fact. That opinion is a part of the record in this appeal, and from it we glean these pertinent facts.

The movants (Thomas, who was enjoined by the original decree, did not seek to have it set aside) asserted that the decree did not express the true settlement agreement, in that movants had not agreed to the entry of an injunction restraining infringement of the Thomas Patents; that there was "undue cooperation" between counsel for plaintiffs and movants' original attorney; that they did not become aware of the contents of the decree until shortly before the motion for relief was filed on November 13, 1962. It was developed at the hearing that Crane Boom Guard Co., Inc., the corporate moving party, had been dissolved. Upon motion and pursuant to applicable Arkansas Statutes, the directors as trustees, were included as moving parties.

Based upon undisputed evidence, Judge Henley found that the terms of the settlement of the infringement action were, (a) the corporate defendant (Crane Boom Guard Co., Inc.) should be dissolved; (b) stock in plaintiff corporation was to be issued to Merritt, Coffey, Thomas and Shelby R. Blackmon;[2] (c) Merritt and Blackmon were to be elected to plaintiff's board of directors; (d) Merritt and Thomas were to be employed by plaintiff at salaries of $100.00 per week and $75.00 per week, respectively; (e) Coffey and Thomas were to assign to plaintiff certain interests in the Thomas Patents which they claimed individually; (f) neither side should be awarded damages and the costs were to be paid by plaintiff.

The terms of the settlement were effectuated and, as Judge Henley found, "apparently things were going smoothly until the latter part of July." On July 27, at a meeting of plaintiff's board of directors, C. H. Earl, president of plaintiff, announced that the cash position of the corporation was weak; that he was eliminating his

2 Mr. Blackmon, an attorney, represented defendants in the infringement action and had been president of the corporate defendant.

salary and he requested Thomas and Merritt to accept salary reductions. Thomas acceded but Merritt refused. Later, Merritt ceased working for plaintiff and resigned from its board of directors. The hearing on the motions also developed that on September 5, 1962 Coffey had filed with the Patent Office, an application for a patent on an insulating device for crane booms. That application had not been acted upon at the time the motion was denied on January 11, 1963.

We turn now to the events which occurred subsequent to the denial of the motion for relief from the injunction. On August 13, 1963, the Patent Office issued Patent No. 3,100,575 to S. A. Coffey for "Crane Boom Life Guard."[3] Coffey and Associates organized a corporation known as Crane Boom Life Guard Co., Inc., (Life Guard) and Coffey assigned his patent to that corporation. Thereafter, pursuant to arrangements with Life Guard, Lon and Pat Weyland manufactured the devices which were sold in competition with the boom guards sold by Saf-T-Boom.

The contempt action was instituted in April, 1964 by Saf-T-Boom. The order to show cause was directed to S. A. Coffey, Life Guard, Lon and Pat Weyland and Weyland Machine Shop. Later, C. H. Earl, president of Saf-T-Boom, and Arthur J. Thomas were added as parties plaintiff. Mel Epperson, Freda Epperson, C. E. Haile, Pauline Haile, shareholders of Life Guard, Osro Cobb, the attorney who incorporated Life Guard, and C. H. Sansom, an independent contractor, who manu-

3 In regard to the Coffey patent, the District Court found in its memorandum opinion filed in the contempt action: "At the commencement of the trial of the current issues, which took place in May of this year, counsel for Life Guard conceded, and the Court now finds independently, that the Coffey device infringes the Thomas patents, if those patents are valid. In this connection the Court fully agrees with Saf-T-Boom that the boom guard marketed by Life Guard is essentially a duplicate of the device described in the Thomas patents. Both of the devices accomplish the same end, by the same means, and in the same manner. As a matter of fact, apart from the possession of the Coffey device of a hook on the end of the guard, the devices are practically indistinguishable. And in the Court's estimation the hook on the Coffey device is not of sufficient importance to distinguish it from the Thomas device as far as patent law is concerned."

factured a boom guard in accordance with the specifications of the Coffey Patent, were added as parties defendant.

In the contempt trial, Life Guard and its allies, advanced the theory that the Thomas Patents were invalid, and that Saf-T-Boom is infringing the Coffey Patent. They denied that they were guilty of contempt, their position being that one cannot infringe an invalid patent.[4] Although the court received evidence on the question of the validity of the Thomas Patents and the Coffey Patent, it is abundantly clear that the case turned on the effect and scope of the 1962 consent decree. After discussing the doctrine of res judicata, the court arrived at the conclusion that "the consent decree bound Coffey, Merritt, and Thomas personally, as well as Crane Boom Guard Company, Inc. Life Guard is in direct privity with Coffey, and in the court's view that privity includes not only the corporation itself but also the corporation's founders and stockholders."

Although the court found that the Coffey device infringes the Thomas Patents, it refrained from adjudging Coffey or any other party guilty of contempt.[5] The court concluded, however, that Saf-T-Boom was entitled to have the original injunctive decree extended to include Life Guard. Accordingly, the court decreed "that Crane Boom Life Guard Company, Inc., which is now a party to this litigation, together with its officers, agents, employees,

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4 This is not true as to the Weylands. They filed a response to the order to show cause, alleged that they were unaware of the injunction, that they had merely manufactured items for Life Guard, had discontinued such manufacturing by reason of the order to show cause and agreed to abide by all orders of the court. The Weylands did not appear as witnesses. Although we find no order dismissing them, they do not appear as appellants in this action and, seemingly, all appellants and appellees recognize that the Weylands are no longer parties.

5 Judge Henley logically reasoned: "Mr. Coffey is not a lawyer or even an engineer. He is a barber with a sideline interest in inventions, particularly boom guards. As a layman he may well have thought that if his device was novel enough to induce the Patent Office to patent it, he would be protected in its manufacture and sale as long as he stayed strictly within the claim of his patent. In the course of the May hearing of the case Mr. Coffey disavowed any intention to deliberately or contumaciously disobey any lawful order of this or any other court."

and servants and all other persons, firms, and corporations in privity with it, be, and they hereby are, perpetually restrained and enjoined from infringing [the Thomas Patents Nos. 2,950,016 and 2,989,194]." The same parties also were permanently enjoined from engaging in unfair competition with Saf-T-Boom.

Appellants pursue here the theme they unsuccessfully advocated in the trial court. Stripped of non essentials, the numerous points appellants set forth in their brief, demonstrate that they regard this proceeding as basically an infringement action involving the validity of the Thomas Patents and the Coffey Patent. They assert, in particular, that the court erred in not invalidating the Thomas Patents and in failing to find the Coffey Patent valid. We believe, as did the District Court, that appellants have missed the mark.

Contrary to the appellant's contention, the resolution of this controversy is not keyed to the question of whether the Thomas Patents are valid as to the general public. The very nature of this contempt action focuses attention upon the consent decree forming the foundation for the order to show cause. The only meritorious question for determination is whether, under the doctrine of res judicata, that valid decree operates to estop the parties who were defendants in that action, and their privies, from launching another attack upon, and from infringing, the Thomas Patents.

The general rule is that the doctrine of res judicata is applicable to a judgment rendered in a patent infringement case by a court of competent jurisdiction, and that such a judgment is binding and conclusive upon the parties to the action and those in privity with them. **Minnesota Min. & Mfg. Co. v. Superior Insulating Tape Co.**, 284 F. 2d 478, 485 (8 Cir. 1960), where Judge Van Oosterhout quotes from 206 U. S. 285: "If rights between liti-

gants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way, and wherever the judgment is entitled to respect, by those who are bound by it." **Siebring v. Hansen,** 346 F. 2d 474 (8 Cir. 1965) cert. den. 382 U. S. 943; **Hopp Press, Inc. v. Joseph Freeman & Co.,** 323 F. 2d 636, 637 (2 Cir. 1963); **Vandeveer v. Erie Malleable Iron Company,** 238 F. 2d 510, 514 (3 Cir. 1956) cert. den. 353 U. S. 937; **Winkelmann v. Calvert,** 154 F. 2d 1012 (Court of Customs and Patent Appeals, 1946).

As a general proposition, a valid judgment or decree in a patent infringement action **entered by agreement or consent,** operates as res judicata to the same extent as a judgment or decree rendered after a contest. **Siebring v. Hansen,** *supra*; **Hopp Press, Inc. v. Joseph Freeman & Co.,** *supra*; **Kiwi Coders Corporation v. Acro Tool & Die Works,** 250 F. 2d 562 (7 Cir. 1958); Annot. 2 A. L. R. 2d 516, 521 (1948); Annot. 97 L. ed. 1188, 1191 (1953).

Appellants submit that because of the public interest in eliminating invalid patents the consent decree should not preclude them from launching an attack on the Thomas Patents, in this proceeding. Appellants remind us of Judge Learned Hand's admonition in **Bresnick v. United States Vitamin Corporation,** 139 F. 2d 239, 242 (2 Cir. 1943) that an invalid patent "should not remain in the art as a scarecrow." **Bresnick,** a typical patent infringement action, presented issues and facts which distinguish it, and render Judge Hand's apt expression inapplicable here.

The Second Circuit again took note of this public interest aspect in the case of **Addressograph-Multigraph Corp. v. Cooper,** 156 F. 2d 483 (2 Cir. 1946), and held that the doctrine of res judicata did not apply to the consent decree that had previously been entered. This declaration by the court is apropos to the issue before us:

> "But even though we can only say that the consent decree left the issue of infringement without adjudication, nevertheless we think on grounds of public policy we ought to rule that in a decree, at least in one entered by consent, **either an adjudication of infringement, or a grant of some relief from which infringement may be inferred, is essential before any effect of res judicata can be given to it on the issue of validity**" (Emphasis supplied). Id. at 485.

In **Addressograph**, supra, the court concluded that since infringement was not adjudicated, it would be contrary to public policy to apply the doctrine of res judicata to a consent decree, in a subsequent attack on the validity of the patent. Our case is in harmony with the **Addressograph** rule. Although the consent decree, under consideration here, does not explicitly adjudge that the defendants had infringed the Saf-T-Boom device, that finding is implicit in the decree. Infringement was the key issue in the original suit; injunctive relief was sought, and pursuant to consent of the defendants, they were "permanently enjoined from infringing United States patents Nos. 2,950,016 and 2,989,194." Surely the injunctive relief granted is "relief from which infringement may be inferred."

Appellants also contend that the consent decree is not binding on all of the appellants. They concede that it applies to, and binds Coffey and tacitly admit as much as to Life Guard. Their argument is that the other individual appellants were not in privity with Coffey and Life Guard.

A decree granting an injunction is binding not only on the parties to the action, but their officers, agents, servants, employees and attorneys, "and upon those persons in active concert or participating with them who receive actual notice of the order by personal service or otherwise." Rule 65 (d) Fed. R. Civ. P., 28 U. S. C. A.; **United States v. Ross**, 302 F. 2d 831, 834 (2 Cir. 1962); 1B Moore's

Federal Practice ¶0.411, p. 1251 et seq; see also 30A Am. Jur., Judgments, § 148; Restatement, Judgments § 83.

Who are privies ordinarily presents a question of fact requiring examination of the circumstances of each case as it arises. 30A Am. Jur. Judgments, § 399; 50 C. J. S., Judgments, § 788. As hereinabove pointed out, appellants Mel and Freda Epperson, C. E. and Pauline Haile are shareholders of Life Guard. Appellant Osro Cobb is the attorney who, in concert with Coffey, brought about the incorporation of Life Guard. Appellant Sansom actually manufactured the device for Life Guard. The District Court found that the parties just named are in direct privity with Coffey and Life Guard. The record contains substantial evidence to support this finding—certainly it is not clearly erroneous.

In summary, the history of this litigation, and the posture of the instant proceeding in the District Court, reduced the issues to the narrow question of whether the consent decree of May 31, 1962 operates to conclusively adjudicate the rights of the parties, and those in privity with them, in the subject matter of the original infringement action. The interest of the general public in the Thomas Patents, and the rights of parties not affected and bound by, the consent decree, to attack the validity of such patents in a proper proceeding, are questions not germane in this case, and are not being determined.

From the record we are satisfied that the District Court properly concluded that the appellants are bound by the consent decree and that they had, in violation of the injunction, infringed the Thomas Patents.

We affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Decree.

United States Court of Appeals for the Eighth Circuit.

No. 18,209. September Term, 1965.

Crane Boom Life Guard Co., Inc., Mel Epperson, Freda Epperson, C. E. Haile, Pauline Haile, Osro Cobb, C. H. Sansom and S. A. Coffey,
Appellants,

vs.

Saf-T-Boom Corporation, C. H. Earl and Arthur J. Thomas.

Appeal From the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel for appellants.

On Consideration Whereof, It is now here Ordered, Adjudged and Decreed by this Court that the Supplemental Decree of the said District Court in this cause be, and the same is hereby, affirmed.

June 30, 1966.

APPENDIX C.

Consent Decree.

(Filed in U. S. District Court on May 31, 1962.)

In the United States District Court,
Eastern District of Arkansas,
Western Division.

Saf-T-Boom Corporation,
Plaintiff,

v.

Crane-Boom Guard Company, Inc., H. P. Merritt, Jr., S. A. Coffey, and Arthur J. Thomas,
Defendants.

No. LR-62-C-66.

On this day, the trial of this cause having been partially finished, the plaintiff and defendants by and through their respective attorneys, E. M. Arnold and Shelby R. Blackmon, announced to the Court that the parties have agreed upon a consent decree in this cause.

It Is Therefore Considered, Ordered, Adjudged and Decreed by the Court in accordance with the agreement and consent of the parties announced to the Court, that the defendants, and each of them be and they hereby are permanently enjoined from infringing United States patents Nos. 2,950,016 and 2,989,194.

It Is Further Ordered, Adjudged and Decreed that no damages be awarded to either the plaintiff or the defendants.

It Is Further Ordered, Adjudged and Decreed that the costs of this action be and they are hereby assessed against the plaintiff.

J. Smith Henley,
United States District Judge.

Date: May 31, 1962.

Approved:

E. M. Arnold,
Attorney for Plaintiff.

Shelby R. Blackmon,
Attorney for Defendants.

APPENDIX D.

(Memorandum Opinion of U. S. District Court.)

(Filed in U. S. District Court on July 15, 1965.)

In the United States District Court,
Eastern District of Arkansas,
Western Division.

Saf-T-Boom Corporation,
Plaintiff,
v.
Crane Boom Guard Company, Inc., H. P. Merritt, Jr., S. A. Coffey and Arthur J. Thomas,
Defendants.
LR-62-C-66.

This protracted case which is a combination patent infringement suit and contempt proceeding has been tried to the Court without a jury. Post-trial memorandum briefs have been submitted and considered. This opinion incorporates the Court's findings of fact and conclusions of law dealing with all issues between the parties.

Plaintiff, Saf-T-Boom Corporation, is an Arkansas corporation and is the assignee and owner of the so-called Thomas patents, Nos. 2,950,016 and 2,989,194. Defendant Crane Boom Life Guard Company, Inc., another Arkansas concern, is the assignee and owner of the so-called Coffey patent, No. 3,100,575. All of those patents describe an insulating device for installation on the meta booms of hoisting machinery such as cranes for the purpose of protecting the operators of the machinery from death or injury resulting from the booms coming into contact with

uninsulted, high tension electric power lines. The Thomas device was developed by Arthur J. Thomas, now of Little Rock, Arkansas, who is a party to the litigation. The Coffey patent was obtained in 1963 by S. A. Coffey, who is also a party to the suit, after the Court had entered and had later refused to set aside a consent decree enjoining Crane-Boom Guard Company, Inc., H. P. Merritt, Jr., S. A. Coffey, and Arthur J. Thomas from infringing the Thomas patents.

The consent decree was entered on May 31, 1962, after a partial trial of this case which had been filed by Saf-T-Boom Corporation against the corporation and the individuals above mentioned. Thereafter, the defendants moved to set the decree aside. That motion was heard in November 1962 and was denied on January 11, 1963. In connection with the denial the Court filed a rather full memorandum opinion dealing with the case as it stood at that time. The Court now makes reference to that opinion.

In the course of the hearing on the motion to vacate the consent decree it came to light that Mr. Coffey was in the process of obtaining the Coffey patent. Following the issuance of the patent Coffey and certain associates who have been brought into the case organized a corporation known as Crane Boom Life Guard Co., Inc., and Mr. Coffey assigned his patent to that corporation.

Crane Boom Life Guard Co. made an arrangement with Lon and Pat Weyand, who operate the Weyland Machine Shop at Hot Springs, to manufacture the device covered by the patent. The Weylands manufactured a number of the devices which were sold by Crane Boom Life Guard Co. in competition with the boom guards sold by Saf-T-Boom Corporation.

In April 1964 Saf-T-Boom Corporation, hereinafter Saf-T-Boom, commenced contempt proceedings against the old

Crane-Boom Guard Co.,[1] H. P. Merritt, Jr., and S. A. Coffey.[2] It was alleged that the respondents were infringing the Thomas patents and were thereby violating the consent decree.

On application of Saf-T-Boom the Court issued a show cause order, and the case immediately became extremely complicated from the standpoint of what may be called the parliamentary situation.

The post-1963 record is voluminous, and the Court will make no effort to list or abstract all of the pleadings and counterpleadings filed by the parties. The Court will not even undertake to list and identify all of the parties who have come into the case since the show cause order was entered.

Succinctly stated, Saf-T-Boom contends that the Thomas patents are valid and that Crane Boom Life Guard Co., Inc., hereinafter Life Guard, and those associated with it are or have been marketing a device which is an exact duplicate of Saf-T-Boom's device. Saf-T-Booms contends further that aside from patent infringement Life Guard has been foisting off its device as being that of Saf-T-Boom, and has been guilty of unfair competition. On the infringement issue Saf-T-Boom contends specifically that Life Guard is infringing claims 1, 4, 6, and 7 of Thomas Patent No. 2,950,016. Saf-T-Boom desires to have its adversaries, both corporate and individual, punished for contempt; desires an injunction against further alleged patent infringement and unfair competition; and finally prays for a money judgment.

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1 It is the understanding of the Court that Coffey's original corporation was dissolved after the Court refused to set the consent decree aside or possibly even before. In any event, the matter is not material in view of the presence in the case of Coffey's present corporation.

2 Following the settlement which brought about the entry of the consent decree, Arthur J. Thomas was given employment by Saf-T-Boom and was not named as a respondent in the contempt proceedings. His position in the case is somewhat ambiguous. While as assignor of the Thomas patents, he is bound to uphold them, it seems clear that his real loyalty is to his friend and former business associate, Mr. Coffey.

Life Guard and its allies contend, on the other hand, that the Thomas patents are invalid, and that Saf-T-Boom is infringing the Coffey patent. They deny that they or any of them are guilty of contempt of this Court, their position being that one cannot infringe an invalid patent. Life Guard seeks appropriate relief directed at the alleged infringement of the Coffey patent by Saf-T-Boom.

At the commencement of the trial of the current issues, which took place in May of this year, counsel for Life Guard[3] conceded, and the Court now finds independently, that the Coffey device infringes the Thomas patents, if those patents are valid. In this connection the Court fully agrees with Saf-T-Boom that the boom guard marketed by Life Guard is essentially a duplicate of the device described in the Thomas patents. Both of the devices accomplish the same end, by the same means, and in the same manner. As a matter of fact, apart from the possession of the Coffey device of a hook on the end of the guard, the devices are practically indistinguishable. And in the Court's estimation the hook on the Coffey device is not of sufficient importance to distinguish it from the Thomas device as far as patent law is concerned.

Life Guard urges that the Thomas patents are invalid because of prior disclosure and use of the device and prior descriptions of it in published literature, the prior disclosure, use and publication allegedly going back as far as 1952. The record is not without substantial evidence to sustain this attack on the patents, but the Court is convinced that on account of the 1962 consent decree Life Guard has no standing to launch the attack.

The doctrine of *res judicata* is applicable to judgments rendered in patent cases; judgments in such cases are binding upon the immediate parties and those in privity

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3 This and later references to Life Guard include the individuals aligned with Life Guard in the case.

with them. Schnell v. Peter Eckrich & Sons, Inc., 365 U. S. 260; United States Pipe & Foundry Co. v. Woodward Iron Co., 4 Cir., 321 F. 2d 98; Minnesota Mining & Manufacturing Co. v. Superior Insulating Tape Co., 8 Cir., 284 F. 2d 478; Vanderveer v. Erie Malleable Iron Co., 3 Cir., 238 F. 2d 510. And a consent decree has the same force and effect as a decree entered after a plenary trial on the merits. Siebring v. Hansen, 8 Cir., ... F. 2d ..., decided June 2, 1965, affirming Hansen v. Siebring, N. D. Iowa, 231 F. Supp. 634; Kiwi Coders Corp. v. Acro Tool & Die Works, 7 Cir., 250 F. 2d 562. A consent decree which adjudicates the validity of a patent and enjoins infringement is *res judicata* in a subsequent contempt proceeding between the same parties and their privies; in such a proceeding the validity of the patent is not an issue. Siebring v. Hansen, supra; Hopp Press, Inc. v. Joseph Freeman & Co., 2 Cir., 323 F. 2d 636; Kiwi Coders Corp. v. Acro Tool & Die Works, supra; Wadsworth Electric Mfg. Co. v. Westinghouse Electric & Mfg. Co., 6 Cir., 71 F. 2d 850; D. E. Stearns Co. v. Brashear, W. D., Mo., 145 F. Supp. 735.

The applicability of the foregoing principles to Life Guard is clear. The consent decree bound Coffey, Merritt, and Thomas personally, as well as Crane Boom Guard Company, Inc. Life Guard is in direct privity with Coffey, and in the Court's view that privity includes not only the corporation itself but also the corporation's founders and stockholders.

It is true that the consent decree in this case does not in terms say that the Thomas patents are valid, but the validity of those patents was directly in issue in the case originally, and the Court thinks that the decree which was entered and which enjoined infringement of the patents by necessary implication included an adjudication of their validity as far as the defendants and their privies

rectly or indirectly, ingeniously or ingenuously, and if in so doing they infringe the Thomas patents, they may well be faced with very serious consequences should a new contempt proceeding be filed and prosecuted successfully.

Each side will bear its own costs. An appropriate decree will be entered.

Dated this 15th day of July, 1965.

/s/ J. Smith Henley,
United States District Judge.

APPENDIX E.

(Supplemental Decree of U. S. District Court.)

(Filed in U. S. District Court on July 15, 1965.)

Pursuant to memorandum opinion this day filed herein, to which reference is hereby made, It is by the Court Considered, Adjudged, and Decreed:

1. That the original consent decree entered in this cause on May 31, 1962, whereby the original defendants herein, namely, Crane Boom Guard Company, Inc., H. P. Merritt, Jr., S. A. Coffey, and Arthur J. Thomas were enjoined and restrained from infringing United States Letters Patent No. 2,950,016 and No. 2,989,194 be, and the same hereby is, continued in full force and effect.

2. That Crane Boom Life Guard Company, Inc., which is now a party to this litigation, together with its officers, agents, employees, and servants and all other persons, firms, and corporations in privity with it, be and they hereby are, perpetually restrained and enjoined from infringing the aforementioned Letters Patent.

3. That without limiting the scope of the original consent decree or of this decree, the parties affected by the Court's injunctions herein are specifically restrained and enjoined from infringing the aforementioned Letters Patent by directly or indirectly manufacturing, selling or using the crane boom guard device described and covered by United States Letters Patent No. 3,100,575, the so-called Coffey Patent, which patent the Court now holds and declares to be invalid.

4. That without limiting or diminishing the force of the original consent decree herein or of this decree enjoining patent infringement as aforesaid, the parties affected by said injunctions and all in privity with such parties are

additionally perpetually restrained and enjoined from engaging in unfair competition with plaintiff, Saf-T-Boom Corporation, in the sale of crane boom guard devices; that is to say, such parties and their privies are perpetually restrained and enjoined from selling or offering for sale any crane boom guards on the pretense that they have been manufactured by Saf-T-Boom Corporation, from selling or offering for sale any crane boom guards deceptively similar to devices manufactured by Saf-T-Boom Corporation, and from using advertising matter or other materials deceptively similar to such matter or materials employed by Saf-T-Boom Corporation which depict pictorially or otherwise, a crane boom guard device deceptively similar to the device manufactured by Saf-T-Boom.

5. That the so-called "Complaint" filed herein by Crane Boom Life Guard Company, Inc., against Saf-T-Boom Corporation and C. H. Earl and Arthur J. Thomas on May 4, 1964, be, and the same hereby is, dismissed with prejudice as being without merit.

6. That the contempt proceedings initiated in this cause by Saf-T-Boom Corporation against S. A. Coffey and others be, and the same hereby are, dismissed, and that the prayer of Saf-T-Boom for a money judgment on account of patent infringement and unfair competition be, and it hereby is, denied.

7. That each side bear all of the costs which it has laid out, expended, or incurred in this action since January 11, 1963.

Dated this 15th day of July, 1965.

/s/ J. Smith Henley,
United States District Judge.

are concerned. As Life Guard argues, courts do not enjoin infringements of invalid patents.

As stated, the Court finds that the Coffey device infringes the Thomas patents. It follows from that finding that the Coffey patent is itself invalid. That invalidity follows as a matter of course if the validity of the Thomas patents is assumed. But even if the Thomas patents are not valid as against anyone other than Life Guard and those allied with it, the Coffey patent would not be helped. Assuming that the Thomas patents are invalid as to the general public, the device which they describe clearly anticipates the device covered by Coffey, and that device is also perhaps anticipated by the same prior art invoked by Life Guard for the purpose of defeating the Thomas patents.

On the issue of unfair competition the Court finds from a preponderance of the evidence that advertising materials used by Life Guard in connection with the sale of its device are deceptively similar to the materials used by Saf-T-Boom. Although the Court is not prepared to say, as Saf-T-Boom contends, that Life Guard actually photographed a machine equipped with Saf-T-Boom's device and circulated the picture as showing a boom guard of Life Guard's manufacture, the Court does find that the similarity which has been mentioned was not accidental, and that Life Guard has been guilty of unfair competition.

The Court does not find that Mr. Coffey or any other party to the case should be held guilty of contempt of court. While it is true that he did cause to be manufactured and sold an infringing device after he received his patent, the fact remains that in the course of the hearing on the motion to vacate the consent decree he revealed that he was processing a new application, and whether valid or invalid the Coffey patent was issued, and the Coffey device was not marketed until after that issuance.

Mr. Coffey is not a lawyer or even an engineer. He is a barber with a sideline interest in inventions, particularly boom guards. As a layman he may well have thought that if his device was novel enough to induce the Patent Office to patent it, he would be protected in its manufacture and sale as long as he stayed strictly within the claim of his patent. In the course of the May hearing of the case Mr. Coffey disavowed any intention to deliberately or contumaciously disobey any lawful order of this or any other court.

Saf-T-Boom is entitled to have the Court's original injunctive decree extended to include Life Guard as a corporation. It needs no further injunctive relief with respect to Coffey or the other original defendants in the case as far as infringement is concerned. However, the Court finds that there should be an injunction against further unfair competition. Normally, in the circumstances Saf-T-Boom would be entitled to a money judgment in some amount on account of Life Guard's infringements and unfair competition. However, the Court has the impression that a recovery of money from defendants is a secondary consideration of Saf-T-Boom, and in any event the Court does not feel that the evidence of record is sufficient to justify a monetary award either by way of royalties or otherwise.

Before closing this opinion the Court desires to make it abundantly clear to Mr. Coffey and to such other involved individuals as may be affected that the considerations which have moved the Court not to find Coffey guilty of contempt would seem to have no validity as far as future infringing conduct is concerned. Mr. Coffey and his associates now know that the Coffey patent is invalid, and they know also that they have no standing to assail the Thomas patents. Hence, if they resume the manufacture of boom guards, either individually or collectively, di-

JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 756.

CRANE BOOM LIFE GUARD CO., INC., NEL EPPERSON, FREDA EPPERSON, C. E. HAILE, PAULINE HAILE, OSRO COBB, C. H. SAWSOM and S. A. COFFEY,
Petitioners,

vs.

SAF-T-BOOM CORPORATION, C. H. EARL and ARTHUR J. THOMAS,
Respondents.

MEMORANDUM

For Saf-T-Boom Corporation, C. H. Earl and Arthur J. Thomas, Respondents.

WAYNE H. OWEN,
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Little Rock, Arkansas,
Counsel for Respondents.

St. Louis Law Printing Co., Inc., 415 N. 8th Street, CHestnut 1-4477

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 796.

CRANE BOOM LIFE GUARD CO., INC., MEL EPPERSON, FREDA EPPERSON, C. E. HAILE, PAULINE HAILE, OSRO COBB, C. H. SANSOM and S. A. COFFEY,
Petitioners,

vs.

SAF-T-BOOM CORPORATION, C. H. EARL and ARTHUR J. THOMAS,
Respondents.

MEMORANDUM

For Saf-T-Boom Corporation, C. H. Earl and Arthur J. Thomas, Respondents.

The respondents would respectfully say to the Court that, as respondents, they are aware that inconsistent opinions of the Courts of Appeals, either among themselves, or with the decisions of this Court, are not always a prerequisite for this Court's taking jurisdiction for the purpose of directing writs to the inferior courts, but the Petitioner in this case has grounded his claim for jurisdiction on the premise that the opinion in the case of **Addressograph-Multigraph Corp. v. Cooper** (C. A. 2), 156 F. 2d 483, and

the opinion of this Court in the case of **United States v. International Building Co.**, 345 U. S. 502, are inconsistent and that by virtue of such, this Court has jurisdiction. Respondents' sole theme in this, its objection to the Court's jurisdiction, would be that the opinion in these two cases are not inconsistent and that neither of them has any bearing upon the question of whether or not the Decree entered by the United States District Court for the Eastern District of Arkansas, as affirmed in the Eighth Circuit Court of Appeals in Case No. 18,209 styled Crane Boom Life Guard Company, Inc., et al. v. Safety Boom Corporation, et al., was a proper and valid adjudication.

In the case of **Addressograph-Multigraph Corp. v. Cooper**, supra, it was alleged in the District Court that a former adjudication was res adjudicata and that the Defendants were estopped by Virtue thereof from contesting the validity of certain patents. The former Decree in that case was as follows:

> "That, whereas the defendants have represented that they have merely furnished to others printing plates employing the invention covered by said Letters Patent as claimed therein, but that they have not made or sold the aforesaid printing plates and have no intention of making, using or selling such printing plates, plaintiff has waived the issuance of an injunction against, and an accounting by, the defendants, Eva Cooper and Milton Berg, and each of them."

The Court of Appeals, in referring to such Consent Decree and in affirming the District Court in holding the entry of such did not estop the Defendants, said:

> "* * * But the court below concluded that the consent decree in the prior suit was invalid as a matter of law for the reason that infringement was not adjudicated therein, and hence that it did not estop any of

the defendants from later contesting the validity of the patent. It found that there was no trial in the former suit nor any adjudication therein on the merits as to the validity of the patent; that the consent decree, although it did not give the defendants any relief, provided for the payment of costs to them; that it did not provide for any injunction or accounting, and that it did not disclose that there had been any infringement of the plaintiff's patent. 'On the contrary,' it found, 'the evidence discloses that the defendants rejected a proposed consent decree submitted by plaintiff to them because it contained an allegation that they infringed the patent. The consent decree, therefore, submitted by the plaintiff to the defendants and signed by them does not contain any allegation of infringement.' And it found 'If the defendants in the prior suit did not infringe at the time said consent decree was entered, they were not seriously interested in any adjudication of the validity of the patent.' On these findings the court below concluded that the consent decree in the prior suit adjudicating the patent to be valid could not be sustained. In other words, the court below held as a general proposition of law that an adjudication of the validity of a patent, unless accompanied by an adjudication of infringement, is invalid and will not estop a defendant from later contesting the validity of the same patent in another suit for infringement brought by the same plaintiff.

"We agree with the District Court that the issue of infringement was not adjudicated one way or the other by the decree in the former suit. * * *"

In the case at bar, after a partial trial of the case and during the course of such, the parties announced to the Court that they had agreed upon a decree and the Court accordingly entered a decree enjoining the infringements

of the respondents' patents. That portion of the decree is as follows:

> "It Is Therefore Considered, Ordered, Adjudged and Decreed by the Court in accordance with the agreement and consent of the parties announced to the Court, that the defendants, and each of them be and they hereby are permanently enjoined from infringing United States patents Nos. 2,900,016 and 2,289,194." (Page 33 of Petition, Appendix C.)

Again in the supplemental decree of the United States District Court entered on July 15, 1965, it is said:

> "That Crane Boom Life Guard Company, Inc., which is now a party to this litigation, together with its officers, agents, employees, and servants and all other persons, firms and corporations in privity with it, be and they hereby are, perpetually restrained and enjoined from infringing the aforementioned Letters Patent.
>
> "That without limiting the scope of the original consent decree or of this decree, the parties affected by the Court's injunctions herein are specifically restrained and enjoined from infringing the aforementioned Letters Patent by directly or indirectly manufacturing, selling or using the crane boom guard device described and covered by United States Letters Patent No. 3,100,575, the so-called Coffey Patent, which patent the Court now holds and declares to be invalid.
>
> "That without limiting or diminishing the force of the original consent decree herein or of this decree enjoining patent infringement as aforesaid, the parties affected by said injunctions and all in privity with such parties are additionally perpetually restrained and enjoined from engaging in unfair competition with plaintiff, Saf-T-Boom Corporation, in the sale

of crane boom guard devices; that is to say, such parties and their privies are perpetually restrained and enjoined from selling or offering for sale any crane boom guards on the pretense that they have been manufactured by Saf-T-Boom Corporation, from selling or offering for sale any crane boom guards deceptively similar to devices manufactured by Saf-T-Boom Corporation, and from using advertising matter or other materials deceptively similar to such matter or materials employed by Saf-T-Boom Corporation which depict pictorially or otherwise, a crane boom guard device deceptively similar to the device manufactured by Saf-T-Boom'' (Pages 43-44, Appendix E, Petition).

So it is obvious that the validity of the Respondents' patents have been litigated twice and the United States District Court, on both occasions, held that the patents were valid and that the Petitioners were enjoined from infringing them. This is a far cry from the formal non-binding consent decree entered in **Addressograph-Multigraph Corp.**

In **United States v. International Building Co.**, supra, which decision is alleged to be inconsistent with Addressograph-Multigraph, the facts were that the Commissioner of Revenues of the United States assessed deficiencies against a Missouri corporation for the years 1933, 1938 and 1939, alleging that certain properties owned by the taxpayer were improperly depreciated. Later, the taxpayer and the collector of revenues agreed upon a compromise and the tax court proceedings were dismissed upon a finding that there was no deficiency tax due for the years specified. Later on, assessments were made for taxes due for the years 1943, 1944 and 1945 based on the same alleged improper manner of depreciation allowances and the taxpayer pled that the dismissal of the assessments for the years 1933, 1938 and 1939 amounted

to a decision on the merits that the proper depreciation method was used for those years and hence, the matter was res adjudicata as to the taxes allegedly due in the years 1943, 1944 and 1945. The Court, in holding that there was no res adjudicata or estoppel in the matter said:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence, see Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214, that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration.
>
> "Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits. But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits. Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See Commissioner v. Sunnen, supra, 333 U. S. at page 598, 68 S. Ct. at page 719. A judgment en-

tered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties."

Hence, it will be seen that there is no possible conflict in the decisions of the two cases in certiorari and in the absence of such, it is respectfully submitted that the writ of certiorari should not be issued.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 796.

CRANE BOOM LIFE GUARD CO., INC., MEL EPPERSON, FREDA EPPERSON, C. E. HAILE, PAULINE HAILE, OSRO COBB, C. H. SANSOM and S. A. COFFEY,
Petitioners,

vs.

SAF-T-BOOM CORPORATION, C. H. EARL and ARTHUR J. THOMAS,
Respondents.

RESPONSE OF PETITIONERS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 796.

CRANE BOOM LIFE GUARD CO., INC., MEL EPPERSON, FREDA EPPERSON, C. E. HAILE, PAULINE HAILE, OSRO COBB, C. H. SANSOM and S. A. COFFEY,
Petitioners,

vs.

SAF-T-BOOM CORPORATION, C. H. EARL and ARTHUR J. THOMAS,
Respondents.

RESPONSE OF PETITIONERS.

I.

The Opinion in the present case as delivered by the Eighth Circuit Court of Appeals, 362 F. 2d 317, is in direct conflict with **Addressograph-Multigraph Corp. v. Cooper,** 159 F. 2d 483, and is also in conflict with the principles of **U. S. v. International Building Co.,** 345 U. S. 502.

Respondents in Memorandum (pp. 1, 2) state:

> "but the Petitioner in this case has grounded his claim for jurisdiction on the premise that the opinion in the case of Addressograph-Multigraph Corp. v. Cooper (C. A. 2), 156 F. 2d 483, and the opinion of

this Court in the case of United States v. International Building Co., 345 U. S. 502, are inconsistent and that by virtue of such, this Court has jurisdiction";

and at 5, Respondents state:

"United States v. International Building Co., supra, which decision is alleged to be inconsistent with Addressograph-Multigraph".

These statements are completely contrary to the Petition for a Writ of Certiorari. **Addressograph** and **U. S. v. International** are themselves consistent; the opinion of the Circuit Court of Appeals for the Eighth Circuit which is here under review is in conflict with those two opinions.

United States v. International Building Co., 345 U. S. 502, states the broad principles relative to a Consent Decree; **Addressograph-Multigraph Corp. v. Cooper**, 159 F. 2d 483, pinpoints the same principles in connection with a Consent Decree in a patent case. These decisions support the position of Petitioners herein and the opinion of the Circuit Court of Appeals for the Eighth Circuit in this case is in conflict with those decisions.

II.

Respondents insist that the entire basis for the Petition for a Writ of Certiorari is upon the inconsistency of prior decisions cited by Petitioners. This is false. The public policy aspect of the enforcement (under any guise) of a patent obtained by fraud upon the Patent Office and which is manifestly invalid is the searching basis here. Respondents conveniently overlook and make no attempt to explain the fraud on the Patent Office and on the public.

III.

On page 5 of Memorandum, Respondents refer to the prior Decrees of the District Court and state:

"The United States District Court on both occasions held that the patents were valid."

Neither the original Decree (Petition, Appendix C, page 33) nor the Supplemental Decree (Petition, Appendix E, page 44) mentions the validity of Thomas Patent 2,950,016.

Not only did the original Defendants reject a Consent Agreement which referred to infringement (R. 12, Petition 14, Footnote 14), the Decree of the Court did not mention it. Not only were the original Defendants not interested in the validity of Thomas 2,950,016 (they refused to admit to prior infringement) the Decree of the District Court did not mention validity.

IV.

Respondents completely ignore Coffey Patent 3,100,575 gratuitously declared invalid by the District Court in the absence of any evidence directed against the validity of or applied to such Coffey Patent. This is understandable: there is no evidence. The District Court here must be clearly erroneous.

V.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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